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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	No. 40646
Plaintiff-Respondent,	)	
	)	Kootenai Co. Case No.
vs.	)	CR-2010-15488
	)	
TIMOTHY EUGENE ESTEP,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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Nature of the Case

Timothy Eugene Estep appeals from his judgment of conviction entered upon the jury verdict finding him guilty of rape. Estep claims the court denied him his constitutional right to represent himself and that the court abused its sentencing discretion.

Statement Of The Facts And Course Of The Proceedings

Estep befriended C.C. when they rode the Citylink bus together. (Trial Tr., p.117, Ls.17-23.) At the time, C.C. was 18-years-old and Estep was 52-years-old. (R., pp.26, 59; Trial Tr.[1], p.117, Ls.10-11; 12/19/2012 PSI, pp.1-2.) One afternoon in August 2010, Estep and C.C. went to Post Falls where Estep purchased "Four Loco malt beverages for them to drink." (R., p.26.) C.C. drank two of them "and became intoxicated and sick." (R., p.26.) After that, Estep drove C.C. to his home where C.C. "remembered being sick," "taking a bath," and "waking up in a bed, naked" with Estep "having sexual intercourse with her." (R., p.26.) C.C. "was scared and tried to pretend like she was sleeping" but heard Estep telling her "he loved her and that she was supposed to be with him." (R., p.26.) After Estep raped C.C., she "acted like she needed to use the bathroom" and "put on her shorts" and a grey sweatshirt Estep gave her to wear.

[1] There are several transcripts included in the record on appeal. The transcript containing the trial and sentencing will be referred to as "Trial Tr." The transcript that includes numerous hearings between February 23, 2011, and April 3, 2012, will be referred to as "Tr." All other transcript references will be by date of the hearing cited.

(R., p.26.) C.C. left the room and fled. (R., p.26.) As C.C. was running down the road, Estep "pulled up along side her in his vehicle" and "tried to tell [her] to get into the car"; C.C. refused and Estep "threw a shirt and bra out the window." (R., p.26; Trial Tr., p.135, Ls.2-7.) C.C. continued running until she found a payphone where she called 911. (R., p.26; Trial Tr., p.134, Ls.22-24, p.135, Ls.8-9.)

When law enforcement arrived, she was upset and having difficulty breathing. (R., pp.25-26.) C.C. has asthma and was having a "panic attack." (R., pp.25-26; Trial Tr., p.137, Ls.6-7.) C.C. was transported to the hospital for an evaluation, including the collection of evidence using a rape kit. (R., p.26.)

The state charged Estep with rape and dispensing alcohol to a minor.[2] (R., pp.348-349.) Before the case even proceeded to a preliminary hearing, Estep was complaining about his appointed counsel and sought a continuance to obtain different counsel. (R., p.59.) Estep's request was granted. (R., p.59.) At the next scheduled hearing date, defense counsel said she intended to file a request for an evaluation pursuant to I.C. § 18-210. (R., p.61.) The court continued the matter again and counsel filed the motion for a competency evaluation the next day. (R., pp.61-63.) On September 20, 2010, the court entered an Order for Evaluation. (R., pp.64-65.) Estep objected to the evaluation. (R., pp.70, 72.)

[2] The state also initially charged Estep with enticement of a child under the age of 16, but that charge was later dismissed pursuant to the state's motion because the victim in this case was 18-years-old at the time of the rape. (R., pp.105-106.)

On October 14, 2010, based on the evaluator's finding that Estep was "unfit to proceed," could not "assist his counsel" and "lack[ed] the capacity to make informed decisions about treatment," the court entered an Order for Involuntary Commitment. (R., pp.74-75.) Approximately two months later, while still committed, Estep submitted a request indicating his intent to obtain new counsel. (R., p.82.) Two days later, the court held a "preliminary hearing status conference" at which time counsel advised the court that Estep wanted to hire an attorney. (R., p.83.) The court continued the preliminary hearing to give Estep time to do so. (R., p.83.) That same day, the court entered an order terminating Estep's commitment as recommended by Dr. Nels Sather. (R., pp.84-85.)

At the next hearing date, on December 22, 2010, Estep requested another continuance due to his preference to hire private counsel; the court granted the request and reset the matter to January 12, 2011. (R., p.87.) Estep was still unable to retain private counsel by January 12, 2011. (1/12/2011 Tr., p.1, Ls.16-17.) However, at that hearing, Estep reiterated that he did not want to be represented by the public defender. (1/12/2011 Tr., p.2, Ls.21-22.) The court advised Estep that although he had the right to appointed counsel, he did not have the right to choose who that attorney would be. (1/12/2011 Tr., p.3, L.4 – p.4, L.9.) The court held a hearing the following day by which time Estep was assigned a new public defender but still indicated he wanted to hire private counsel. (R., p.89.) The court declined another continuance and the case proceeded to preliminary hearing. (R., pp.89-100.) The court found probable

cause to bind Estep over and advised him he could hire private counsel at any time. (R., p.100.)

Through various "kites" that were submitted to the court, Estep continued to express his dissatisfaction with being represented by the public defender's office and his desire to hire private counsel. (R., pp.109-110, 140-141.) Estep reiterated these sentiments during court hearings in front of Judge Benjamin Simpson. (R., pp.111-112, 140-141.) At a hearing held in front of Judge Simpson on June 9, 2011, Estep asked: "Probably no way you would let me defend myself, is there? Only a fool defends himself, and I am pretty stupid." (Tr., p.23, Ls.13-15.) Estep also complained that appointed counsel had not done anything and after inquiring of Estep regarding his ability to represent himself, the court expressed concern about "18-210 issues," and discussed with Estep his efforts to hire an attorney. (See generally Tr., pp.25-32.) The court asked the public defender to facilitate Estep's efforts to hire an attorney and continued the matter again. (Tr., p.32, L.18 – p.33, L.8.) Judge Simpson also ordered another competency evaluation. (R., pp.142-143.)

At the next hearing, the public defender provided the court with a letter from attorney John Rose, whom Estep wanted to represent him. (R., pp.144-145.) Mr. Rose noted that Estep wanted assistance "identify[ing] the assets in his conservatorship estate and to defend his criminal charges." (R., p.145.) Mr. Rose revealed, however, that Estep did "not have the money to retain [Mr. Rose's] services" but he "would be willing to accept an appointment to represent Mr. Estep in the guardianship matter and/or criminal defense." (R., p.145.) The

court noted its intent to wait until the competency evaluation was completed before it made any further determinations regarding Estep's representation. (Tr., p.40, Ls.5-7.)

Despite the pending evaluation, Estep continued to submit kites asking for the removal of the public defender and to proceed pro se. (R., pp.167, 174.) At the next hearing, the court addressed Estep's requests, noting it was still waiting for the evaluator's competency report. (Tr., p.43, L.22 – p.45, L.5.) Estep acknowledged as much but advised the court that Mr. Rose agreed to represent him for "$75 an hour" and asked that Mr. Rose be appointed to "help [him] with [his] pro se" but not as "attorney of record." (Tr., p.45, Ls.6-18.) The matter was continued pending the results of the second evaluation. (R., p.175.)

At the next hearing, a status conference held on November 18, 2011, at which Estep was represented by a conflict public defender, counsel advised the court that he just received the competency report and it indicated Estep was competent to proceed. (Tr., p.55, L.5-14.) At that time, although Judge Simpson had not yet seen the report (and, in fact, defense counsel objected to it being disclosed to the court), he stated he had "no intention of letting [Estep] represent himself." (Tr., p.55, Ls.10-25.)

The next hearing, held February 2, 2012, was for a motion to compel production of the evaluation. (R., p.198.) At that hearing, Judge Simpson expressed concern over Estep's mental health and stated he wanted a Designated Examination conducted within 24 hours. (Tr., p.68, Ls.6-9.) Estep protested and his attorney advised the court that Estep was competent and did

not want any treatment. (Tr., p.68, Ls.14-15, p.69, Ls.11, 17-23.) The court nevertheless entered an Order for Designated Examination. (R., p.200.)

On February 28, 2012, Judge Simpson entered an order finding Estep competent to proceed. (R., p.209.) Because of health issues related to Estep's refusal to eat, on April 3, 2012, the court released Estep on his own recognizance. (See generally Tr., pp.83-85; Tr., p.90, Ls.10-13 (counsel notes Estep had not "eaten solid food since around Thanksgiving"); R., pp.225-226, 230-233.) On that same date, the court advised Estep:

> Mr. Estep, with respect to your motion to represent yourself, we have already done that twice. I have already told you no twice. I am telling you no again. You have an attorney. You are going to continue to have an attorney unless you get to a much better condition where I think you can communicate and represent yourself. So your motion for pro se representation is denied.

(Tr., p.112, Ls.2-9.)

After being released, Estep appeared at hearings with counsel without requesting the ability to proceed *pro se*, although he did submit a *pro se* pleading for investigative funds. (R., p.239 (5/24/2012 hearing, Estep appears with counsel and no request to proceed *pro se* noted in court minutes); p.245 (7/27/2012 hearing, Estep appears with counsel and no request to proceed *pro se* noted in court minutes); pp.249-252 (*pro se* motion).)

On November 14, 2012, an Order of Voluntary Disqualification was entered disqualifying Judge Simpson from presiding over Estep's case, which was the result of Estep making a death threat against him. (R., pp.258, 262-263.) Judge John T. Mitchell replaced Judge Simpson. (See R., p.264.)

On November 21, 2012, one week after Judge Simpson disqualified himself, and just 12 days before trial was set to commence, Estep, through counsel, filed a motion to disqualify "all judges chambered in Kootenai County" because of the alleged death threat against Judge Simpson. (R., p.17 (9/7/2012 entry, noting trial set for 12/3/2012), pp.262-263.) Counsel also filed a motion seeking leave to withdraw or to allow Estep to proceed *pro se* with stand-by counsel. (R., pp.260-261.) The motion indicated Estep "repeatedly informed" counsel "of his desire to fire [him] and have counsel removed from the case." (R., p.260.) The motion further states Estep "has clearly demanded his right to represent himself." (R., p.261.) The court held a hearing on both motions. The court first denied Estep's request to disqualify all judges chambered in Kootenai County. (Trial Tr., p.11, Ls.6-7; R., pp.266-271.)

With respect to the motion to allow counsel to withdraw, counsel advised the court:

> . . . Mr. Estep has exercised his right to proceed pro se. **He's informed me this morning that he does not want to proceed pro se; instead, he just wants a different attorney.** As the Court can see, he has – has or will or may file some bar complaints against me, and so that doesn't cause me any stress if the Court were to allow me to withdraw. At this point Mr. Estep has been very clear, he's been very adamant for the last month and a half that he wants me off this case.
>
> Since his arrest with the alleged threat to Judge Simpson's life, since his arrest that has become even more of [sic] vociferous. He does not want me as his attorney at this trial, so, **Your Honor, I'd ask the Court grant me leave to withdraw and assign a different conflict public defender.**

(Trial Tr., p.11, L.16 – p.12, L.6 (emphasis added).)

The court denied the request. (Trial Tr., p.12, L.20 – p.13, L.4; R., p.271.)

On December 7, 2012, three days before trial, Estep filed a kite asking to "bring a motion to pro-se if not total then for cross exanation of any prosection withiness." (R., p.404 (verbatim, capitalization altered, underlining original).) Estep did not raise the issue when he next appeared in court, which was the morning of trial, and nor did the court independently take action on this request other than to forward a copy to defense counsel and to the state the day before trial. (R., p.404.)

The case finally proceeded to trial on December 10, 2012, more than two years after Estep raped C.C. At his request, Estep was tried in absentia and the jury found Estep guilty of both charged offenses. (See Trial Tr., p.27, L.13 – p.43, L.20; R., p.401.) The court imposed a 180-day jail sentence for the dispensing alcohol charge, with 180 days credit for time served, and a fixed life sentence for the rape charge. (R., pp.430-432; Trial Tr., p.445, Ls.13-17, p.446, Ls.21-23.) Estep filed a timely notice of appeal. (R., pp.439-441.)

ISSUES

Estep states the issues on appeal as:

1. Did the district court violate Mr. Estep's rights under the Sixth Amendment to the United States Constitution, Article I, § 13 of the Idaho Constitution, and Idaho Code §§ 19-106 and 19-857, when it refused to permit him to represent himself at trial?

2. Did the district court abuse its discretion when it imposed a fixed life sentence following Mr. Estep's conviction for non-forcible rape?

(Appellant's Brief, p.3.)

The state rephrases the issues as:

1. Has Estep failed to establish any violation of his right to self-representation?

2. Has Estep failed to show the district court abused its sentencing discretion?

ARGUMENT

I.
Estep Has Failed To Show That His Constitutional Right To Self-Representation Was Violated

A. Introduction

Estep argues he was denied his right to self-representation "when the district court first denied and then ignored his requests to proceed *pro se*." (Appellant's Brief, pp.10-11.) Estep asserts a denial of this right by both Judge Simpson and Judge Mitchell. (Appellant's Brief, pp.13-14.) Both arguments fail. Any rulings by Judge Simpson are irrelevant to whether Estep was denied his right to represent himself at trial because Judge Simpson did not consider the two pertinent requests regarding Estep's representation at trial - the motion Estep filed on November 21, 2012, or the kite he submitted on December 7, 2012. Estep has failed to show Judge Mitchell violated his right to self-representation with respect to the November 21, 2012 motion because Estep did not seek to represent himself at that time; he sought the appointment of new counsel. Estep has also failed to establish a denial of the right to self-representation as a result of the court's failure to act on the December 7, 2012 kite because Estep never pursued that request in court. Estep's claims that he was denied his right to represent himself therefore fail.

B. Standard Of Review

An appellate court will defer to findings of fact supported by substantial evidence, but freely review the application of constitutional requirements to the

facts found. State v. Jennings, 122 Idaho 531, 533, 835 P.2d 1342, 1344 (Ct. App. 1992).

C. Estep Has Failed To Show Any Relevant Denial Of His Right To Self-Representation

The Sixth Amendment to the United States Constitution and Article I, section 13, of the Idaho Constitution both provide the right to self-representation. State v. Folk, 151 Idaho 327, 339, 256 P.3d 735, 747 (2011). However, "the right of self-representation is not absolute." Indiana v. Edwards, 554 U.S. 164, 171 (2008). In Edwards, the Supreme Court held that, even assuming a criminal defendant "has sufficient mental competence to stand trial . . . and that the defendant insists on representing himself during that trial," "the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks mental capacity to conduct his trial defense unless represented." Id. at 174. In reaching this conclusion, the Supreme Court quoted the American Psychiatric Association's position that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." Id. The Court further reasoned:

> . . . a right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's

> lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial. As Justice Brennan put it, the Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.
>
> Further, proceedings must not only be fair, they must appear fair to all who observe them.

Edwards, 554 U.S. at 176 (quotations and citations omitted).

The Court concluded "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." Edwards, 554 U.S. at 177-178. Estep has failed to show his right to self-representation was violated.

Estep first complains that Judge Simpson violated his right to self-representation. (Appellant's Brief, pp.13-14.) This Court should decline to consider any of Estep's arguments in this regard because Judge Simpson did not ultimately determine the manner in which Estep would be represented at trial. Although Judge Simpson undoubtedly addressed the issue at various points in the two years Estep's case was pending, and last told Estep he would not allow him to represent himself "unless" Estep could "get to a much better condition where [he could] communicate and represent [himself]," the final determination prior to trial was made by Judge Mitchell. As such, this Court should only consider Judge Mitchell's determinations on this issue.[3]

[3] To the extent Estep is asserting some deprivation of his right to represent himself pre-trial, it is unclear how a deprivation of any such right would entitle him to the relief he requests, *i.e.*, vacating his convictions. Nevertheless, even

With respect to Judge Mitchell's decisions, Estep acknowledges that at the hearing on the November 21, 2012 motion filed by counsel, counsel clarified that Estep did not want to proceed *pro se*, but instead wanted a different attorney. (Appellant's Brief, p.10.) Estep did not dispute counsel's clarification, nor is it reasonable or appropriate to presume that counsel was not accurately communicating Estep's wishes, especially in light of the fact that counsel filed the motion in the first instance. (See generally Trial Tr., p.11, L.16 – p.13, L.6.) Although Estep now implies this may have been improper, noting he was not asked any questions by the district court prior to the clarification by counsel, he offers no argument or authority to support any claim that the court's denial of the November 21, 2012 motion was erroneous. (Appellant's Brief, p.10.) Instead, Estep asserts, "Regardless of whether Mr. Estep's attorney could have waived the issue of self-representation at the hearing on defense counsel's motion, three days before trial started, Mr. Estep filed a kite . . . in which he again sought to exercise his right to self-representation." (Appellant's Brief, p.10.) Thus, any claim in relation to the ruling on the November 21, 2012 motion is waived.[4] State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on

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assuming the Court considers Judge Simpson's pre-trial determinations relating to Estep's requests regarding the status of his representation (which were frequently requests for different counsel, rather than to proceed *pro se*), the record supports Judge Simpson's decision to not allow Estep to represent himself because the information available to Judge Simpson supports his conclusion that Estep was not competent to do so under Edwards.

[4] Moreover, the district court was well within its discretion to deny Estep's request for substitute counsel. State v. DeWitt, 153 Idaho 658, 661, 289 P.3d 60, 63 (Ct. App. 2012) ("The Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution guarantee the right to counsel. The right to counsel does not necessarily mean a right to the attorney of one's choice.").

appeal are not supported by propositions of law, authority, or argument, they will not be considered.").

Specifically addressing the December 7, 2012 kite, Estep complains the "district court made no attempt to address this request with [him]" even though it "forwarded copies to defense counsel and the prosecuting attorney the day before trial." (Appellant's Brief, p.10.) Estep, however, ignores that he had the opportunity to raise this issue before trial commenced on December 10, 2012. On the morning of trial, the court took up pre-trial matters at 8:33 a.m., which included whether restraints should be used and Estep's refusal to wear civilian clothes – choosing instead to appear in his orange jail clothing. (Trial Tr., p.15, L.2 – p.19, L.23.) Following the discussion of Estep's attire, Estep decided he wanted to be tried in absentia. (Trial Tr., p.27, Ls.13-22.) When asked for his reasons, defense counsel told the court Estep wanted to personally "address the Court on that issue." (Trial Tr., p.29, Ls.12-14.) Estep did so, stating:

> . . . I believe absentia would be best for me. **I'll trust [defense counsel's] abilities to defend me.** We've had some disagreements, and I feel like that if I'm present, I may bring those disagreements up. Uh, I haven't slept properly in the jail, although today I am very clear. I haven't ate properly on a religious fast, and I'm not sure how that's gonna affect me later on, but I am currently in a clear state of mind. **I believe that you and this court has the ability to handle my fate properly**, and me being there I only think could cause me to at some point be agitated. I can't always be in control of my behavior.

(Trial Tr., p.29, L.18 – p.30, L.4 (emphasis added).)

Estep also declined defense counsel's suggestion that Estep be brought to court each morning to ensure his continued desire not to attend his own trial; stating, "I don't see a purpose in that. Anything I could be -- I could be sent any

paperwork I need to be sent to the jail. We can talk on the phone. If I get an epiphany, I will call you." (Trial Tr., p.40, Ls.8-12.) The court told Estep that if he changed his mind at any point, it would "resume the trial with [him] present" and would "do that in an instant." (Trial Tr., p.40, L.19 – p.41, L.2.) Estep stated he understood and told Judge Mitchell, "I understand, and to make you even more comfortable, I think I've written you enough stuff in the jail; you know if I have any issues, I will write you." (Trial Tr., p.41, Ls.14-16.) Judge Mitchell acknowledged that but cautioned Estep against communicating via kite if he changed his mind about participating in his trial due to the possibility that the kite would not reach the court in a timely fashion; the judge told Estep to instead communicate with jail staff and he would "make sure that they pass that information along to [him] immediately." (Trial Tr., p.41, L.22 – p.42, L.8.) Estep said he understood. (Trial Tr., p.42, Ls.7-9.)

In light of the foregoing, Estep's complaint that Judge Mitchell "made no attempt to address" his December 7, 2012 kite is not well-founded. Estep had the opportunity to present his request to the court before trial started and rather than doing so, he expressed his trust in counsel's ability to represent him at trial; indeed, to represent him even in his absence. Estep cannot seriously contend that he was deprived of the opportunity to be heard on this issue. (Appellant's Brief, p.14.) Estep's claim that Judge Mitchell violated his right to self-representation fails.

Finally, Estep argues that even if he did not suffer a Sixth Amendment violation, he was deprived of his rights under the Idaho Constitution and Idaho

Code §§ 19-106 and 19-857. (Appellant's Brief, pp.17-19.) According to Estep, Idaho Code §§ 19-106 and 19-857, "confer" a right to self-representation "in a manner that suggests a more robust right than is guaranteed under the Sixth Amendment." (Appellant's Brief, p.18.) This assertion appears to be based on two grounds. First, Estep notes that I.C. § 19-857, which allows a criminal defendant to waive the right to counsel, requires the court to consider "such factors as the person's age, education and familiarity with the English language and the complexity of the crime involved," in determining whether the defendant, in waiving the right, "has acted with full awareness of his rights and of the consequences of a waiver." (Appellant's Brief, pp.18-19.) Second, Estep cites both I.C. § 19-106, and State v. Athens, 36 Idaho 224, 210 P.133 (1922), which recognize that a criminal defendant can either appear with counsel or defend himself. (Appellant's Brief, pp.18-19.) The state fails to understand how either statute, or the opinion in Athens, reflect a "more robust right than is guaranteed under the Sixth Amendment."

While it is true that the Idaho Supreme Court has said that it will not "blindly apply United States Supreme Court interpretation and methodology when in the process of interpreting their own constitutions," (Appellant's Brief, p.18 (quoting State v. Newman, 108 Idaho 5, 10 n.6 (1985)), the Court has also stated: "Generally, the federal framework is appropriate for analysis of state constitutional questions unless the state constitution, the unique nature of the state, or Idaho precedent clearly indicates that a different analysis applies." CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 383, 299 P.3d 186, 190

(2013). "Thus, this Court will consider federal rules and methodology when interpreting parts of the Idaho Constitution that have an analogous federal provision." CDA Dairy Queen, 154 Idaho at 383, 299 P.3d at 190.

Estep has cited no case in which the appellate courts of this state have departed from United States Supreme Court precedent with respect to the Sixth Amendment right to self-representation, much less any principled reason for doing so. In fact, if anything, Idaho's courts have adhered to Supreme Court jurisprudence on this point. See, e.g., Folk, 151 Idaho at 339, 256 P.3d at 747; State v. Hawkins, 148 Idaho 774, 778-779, 229 P.3d 379, 383-384 (Ct. App. 2009) (citing Edwards, supra).[5] Estep's claim that he has a greater right to represent himself under the Idaho Constitution should be rejected.

[5] Ironically, Estep cites Hawkins, "applying *Edwards*," in discussing competency standards (Appellant's Brief, p.12), but in arguing that the Idaho Constitution provides greater protections, he states "[t]he fact the United States Supreme Court has . . . diminished the Sixth Amendment right to self-representation, does not mean that the Idaho Supreme Court should do likewise" (Appellant's Brief, p.18). It is unclear whether he reconciles this discrepancy because Hawkins is a Court of Appeals case. Regardless, as already noted, Estep has not cited any Idaho case departing from the Supreme Court on the right to self-representation.

II.
Estep Has Failed To Establish The District Court Abused Its Discretion In Imposing A Fixed Life Sentence

A. Introduction

Estep "asserts that, in light of his brain injury and the nature of this offense, the district court abused its discretion when it imposed a fixed life sentence following his conviction for non-forcible rape." (Appellant's Brief, p.20.) The record and the law support the sentence imposed.

B. Standard Of Review

"Where the sentence imposed by a trial court is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion." State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (quotations and citations omitted). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." Id.

C. Estep Has Failed To Establish The District Court Abused Its Discretion In Imposing Sentence

The applicable legal standards for reviewing a sentencing court's exercise of discretion are well established. Where, a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Windom, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Windom, 150 Idaho at 875, 253 P.3d at 312 (citations omitted). A sentence is reasonable, however, if it appears necessary to achieve the

primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id. at 875-76, 253 P.3d at 312-13; State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001).

Rape is punishable by a maximum allowable sentence of fixed life imprisonment. I.C. § 18-6104. Because the fixed life sentence imposed upon Estep's conviction is within the statutory limit, Estep bears the burden on appeal of showing that his sentence is excessive. State v. Hedger, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989). On appeal, the question before this Court is not what sentence it would have imposed, but rather, whether the district court abused its discretion. State v. Stevens, 146 Idaho 139, 148-49, 191 P.3d 217, 226-27 (2008) (citing State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982)); see also Windom, 150 Idaho at 875, 253 P.3d at 312 ("[W]here reasonable minds might differ, the discretion vested in the trial court will be respected, and this Court will not supplant the views of the trial court with its own."). Estep has not demonstrated from the record any abuse of discretion in the district court's determination that a fixed life term of imprisonment was not only warranted, but also necessary, under the facts of this case.

The Idaho Supreme Court has held: "To impose a fixed life sentence requires a high degree of certainty that the perpetrator could never be safely released back into society or that the nature of the offense requires that the individual spend the rest of his life behind bars." Windom, 150 Idaho at 876, 253 P.3d at 313 (citing Stevens, 146 Idaho at 149, 191 P.3d at 227; State v. Cross, 132 Idaho 667, 672, 978 P.2d 227, 232 (1999)) (internal quotations and

emphasis omitted). This "high degree of certainty" is generally satisfied where "the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or if the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society." State v. Perez, 145 Idaho 388, 179 P.3d 346 (Ct. App. 2008) (emphasis added).

Estep first asserts "[p]erhaps the most important factor demonstrating the unreasonableness of the fixed life sentence . . . is the nature of the offense." (Appellant's Brief, p.21.) Specifically, Estep finds it significant that he "used no force or threat of force to commit the rape" but he "instead took advantage of the victim's voluntarily intoxicated state to engage in non-consensual sexual intercourse with her." (Appellant's Brief, p.21.) The law makes no distinction between "forcible" or "non-forcible" rape for purposes of the maximum sentence authorized. Beyond that, to suggest, as Estep's argument does, that C.C. felt any less fear or suffered any less harm than she would have if Estep had instead threatened her in order to rape her belittles the fear C.C. did, in fact, experience as a result of Estep's actions.

In a similar vein, Estep asserts he is "not someone with a history of violence." (Appellant's Brief, p.21.) This contention ignores that Estep is, however, someone with a history of being a sexual predator, which was a significant factor in the court's sentencing determination. In explaining the reason for imposing a life sentence, the district court reviewed Estep's history in this regard:

> Let's go back to the July 28th, 2006, event, and I'll explain why my decision is a life sentence. Again, you put your hands down the pants and fondled the vagina and breasts of your twelve-year-old mentally disabled victim. You lured her into your home every day for a week, and on July 28th, 2006, you pled guilty to touching her breasts and vagina with your hands.
>
> October 24th, 2006, a complaint was issued by the Kootenai County Prosecuting Attorney charging you with lewd conduct with a child under age eighteen . . .. When you got wind that you were being charged with that offense, you fled to Canada. You were gone for a year. . . .
>
> . . .
>
> January 11th, 2008, you entered your guilty plea to the reduced charged of felony injury to child. . . . A full disclosure polygraph was performed and a psychosexual evaluation was performed. I'll talk more about those later.

(Trial Tr., p.446, L.25 – p.448, L.16.)

Discussing the polygraph, the court noted that when asked how many victims he had, Estep "estimated [he] had about twenty." (Trial Tr., p.450, Ls.16-18.) The court continued:

> You then proceeded to list in chronological order -- I counted 29 victims . . . Of those 29 victims, 21 involved fact situations extremely similar to what you did to C.C. on August 4th, 2010. You did say that to him. I don't care if you remember. I am finding as a fact that you said those things . . . and you said those things prior to raping C.C. on August 4th, 2010.
>
> The reason for my life sentence is, either way, you can't be placed on probation. If you were truthful in what you said regarding those 29 prior victims, then you're a serial rapist and you need to go to prison. If you're just making this stuff up, you're making up stuff that in 21 of the 29 cases is the exact blueprint you followed two years later, August 4th, 2010, with C.C. in the present case. I don't see a different outcome for you. It would not make any difference whether you were telling [the polygrapher] the truth in 2008 or fabricating it, because even if you're fabricating it, you are playing this event that's about to happen to C.C. on August 4th, 2010, over and over again in your very sick mind.

> The second offense, 28 months after you're placed on probation for the reduced offense of injury to child, was to C.C. I've already talked about you are the only person that made her unconscious. In your statements to Detective Martin you blamed that on your buddy Mike, but that wasn't C.C.'s testimony. You're the one that provided her with the alcohol. You're the one that didn't have any alcohol, and I know exactly why. You wanted to follow through with your business plan that you'd filed with [the polygrapher] two years earlier.

(Trial Tr., p.450, L.18 – p.451, L.25.)

The court later stated: "I do not feel that rehabilitation is even remotely possible." (Trial Tr., p.460, L.25 – p.461, L.1.) This factor, in conjunction with the threat Estep presents to the community, especially young and adolescent females supports imposition of a fixed life sentence. Estep has failed to establish an abuse of discretion.

CONCLUSION

The state respectfully requests that this Court affirm Estep's judgment of conviction.

DATED this 14th day of February, 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of February 2014, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General